

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

	x	
	:	
UNITED STATES OF AMERICA,	:	Criminal Action
	:	
Plaintiff,	:	No. 2:14-cr-00264-1
	:	
v.	:	
	:	Date: February 11, 2016
DENNIS P. FARRELL,	:	
	:	
Defendant.	:	
	x	

PARTIAL TRANSCRIPT OF SENTENCING HEARING HELD
BEFORE THE HONORABLE THOMAS E. JOHNSTON, JUDGE
UNITED STATES DISTRICT COURT
IN CHARLESTON, WEST VIRGINIA

APPEARANCES:

For the Government:	AUSA PHILIP H. WRIGHT AUSA LARRY R. ELLIS AUSA ERIC P. BACAJ U.S. Attorney's Office P.O. Box 1713 Charleston, WV 25326-1713
For the Defendant:	MICHAEL W. CAREY, ESQ. S. BENJAMIN BRYANT, ESQ. Carey Scott Douglas & Kessler P. O. Box 913 Charleston, WV 25323
Probation Officer:	Matthew Lambert
Court Reporter:	Ayme Cochran, RMR, CRR

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transcript produced by computer.

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**GOVERNMENT 'S
WITNESSES****DIRECT****CROSS****REDIRECT****RECROSS****EXAMINATION**

None

**DEFENDANT 'S
WITNESSES****DIRECT****CROSS****REDIRECT****RECROSS****EXAMINATION**

None

**GOVERNMENT 'S
EXHIBITS****ADMITTED**

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**DEFENDANT 'S
EXHIBITS****ADMITTED**

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1 PROCEEDINGS had before The Honorable Thomas E. Johnston,
2 Judge, United States District Court, Southern District of West
3 Virginia, in Charleston, West Virginia, on February 11, 2016, at
4 2:00 p.m., as follows:

5 COURTROOM DEPUTY CLERK: The matter before the Court is
6 the United States of America versus Dennis Farrell, criminal
7 action number 2:14-cr-00264-1, scheduled for sentencing.

8 THE COURT: Good afternoon. Will counsel please note
9 their appearances?

10 MR. WRIGHT: Good afternoon, Your Honor. Philip
11 Wright, Larry Ellis, and Eric Bacaj on behalf of the United
12 States.

13 MR. CAREY: Good afternoon, Your Honor. Mike Carey and
14 Ben Bryant on behalf of the defendant, Dennis Farrell, who is
15 present in the courtroom.

16 THE COURT: Good afternoon. Mr. Farrell, will you
17 please stand, and I will ask the deputy clerk to administer an
18 oath to you at this time.

19 COURTROOM DEPUTY CLERK: Please raise your right hand.

20 **DENNIS FARRELL, DEFENDANT, SWORN**

21 THE COURT: You may be seated.

22 Mr. Farrell, do you understand that you are now under oath
23 and you must tell the truth and, if you testify falsely, you may
24 face prosecution for perjury or for making a false statement?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: Throughout the course of this hearing, if
2 there's anything that occurs that you don't understand, I want
3 you to feel free to speak up and seek clarification.

4 Also, if at any time you need to confer with your attorneys,
5 I'll be pleased to pause the proceedings to allow you to do so.
6 Do you understand all that?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: All right. Mr. Carey, have you received
9 and read and reviewed with your client a copy of the most recent
10 edition of the Presentence Report?

11 MR. CAREY: I have, Your Honor.

12 THE COURT: And, Mr. Farrell, have you received and
13 read and reviewed with your counsel a copy of the most recent
14 edition of the Presentence Report?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: You all may remain seated unless I indicate
17 otherwise.

18 MR. CAREY: Thank you, Your Honor.

19 THE COURT: Has the Government received and reviewed a
20 copy of the Presentence Report?

21 MR. WRIGHT: Yes, Your Honor.

22 THE COURT: All right. Mr. Carey, you've written
23 prolifically on this case. Do we have any -- and I understand
24 most of what you've written in the way of the version of the
25 offense and the objections or factual clarifications you're just

1 trying to bring to the Court's attention and I've read all that
2 stuff. Is there anything I really need to act on?

3 MR. CAREY: I don't believe so, Your Honor, but two
4 points of clarification. As the Court has recognized, prior to
5 the drafting of the Presentence Report, I sent a very lengthy
6 defendant's version of the offense with supporting documentation
7 in relation thereto.

8 When I received the draft, significant -- what I consider to
9 be significant portions of my letter weren't included and so, I
10 formed them both in the form of an objection and revised the
11 letter after meeting with Mr. Wright and indicated that except
12 for those things which he had noted as objecting to in the
13 Presentence Report, there was a general agreement about those
14 things.

15 When I met with Mr. Lambert, he indicated that they proposed
16 simply appending my letter and making reference to it from time
17 to time in the objections and I thought that was going to be done
18 up until about the day before when he said he was going to send
19 it under separate cover. I would just ask that that letter of
20 January 19, 2016 be appended to and travels with the PSR wherever
21 it goes, in other words.

22 THE COURT: Is there any objection?

23 MR. WRIGHT: No, Your Honor.

24 THE COURT: All right. Just so we're clear, too, Mr.
25 Wright, and I really wasn't reading it from this perspective, but

1 I did read Mr. Carey's letter. It's about 26 pages long. He
2 indicates that the Government generally doesn't have a quarrel
3 with what's in it, although it seemed to me that there were some
4 points in there that you might not totally agree on. Where
5 exactly does the Government stand on that?

6 MR. WRIGHT: Your Honor, it was difficult to go through
7 that and say, should that be in the PSR? Should that be in the
8 PSR? Some of the statements were such-and-such or so-and-so said
9 something. I don't necessarily dispute that so-and-so said
10 something, but I'm not sure that I agree that that actually is a
11 truthful statement, or that that is factually correct, or that it
12 is even relevant factually or legally today. So, I didn't go
13 through it line by line. And, so, where Mr. Carey says that
14 so-and-so says something, yeah, I agree that so-and-so said
15 something.

16 THE COURT: So, I can't really read that as something
17 that the Government fully subscribes to?

18 MR. WRIGHT: No, Your Honor, and it would be difficult
19 for me to go through that, the entire length of that letter, and
20 say this is okay to be in there and this is not; and this is okay
21 and this is not.

22 THE COURT: Well, and I might be a step either ahead of
23 you or behind you on this, that I'm looking at it in terms of
24 just considering the facts, not so much of what goes into the
25 Presentence Report because that's a determination that the

1 probation officer makes before it gets to me.

2 But, you know, I read it as coming from the defendant's
3 standpoint and I know enough about this case to know that there
4 probably is quite a bit in that letter that you all probably
5 wouldn't quarrel with, but there are probably some things in
6 there that, in the end, don't really make that much of a
7 difference that you might not agree with. For example, probably
8 the most obvious thing is this business of how the MCHM --
9 whether the MCHM, how much of it went under or through the wall
10 or, maybe, I think in the view of the Government, through cracks
11 in the pavement, in the floor, versus how much of it went through
12 the ground under the tank and ended up running along that
13 culvert. I'm not so sure you all are in total agreement on those
14 two things, but in the end, they don't really matter because the
15 containment didn't work, right?

16 MR. WRIGHT: I agree with that statement.

17 MR. CAREY: We agree that, yes, in the end, the
18 containment didn't work. It was relevant simply to judge the
19 role of this defendant in context of the whole case.

20 THE COURT: I understand that. And, largely, that went
21 to the business about the repairing of the riverbank sometime ago
22 that didn't happen.

23 MR. CAREY: Yes, at which time they were going to
24 explore the cause of the water that was coming through the storm
25 pipe, which we believe is the primary channel.

1 THE COURT: All right. Well, I mean, I've read a lot of
2 stuff in this case, at this point, but I think I understand all
3 that.

4 All right then. So, to the extent that -- again, I've read
5 and, to the extent possible, digested the information presented
6 by counsel. I don't see that there are any live objections here
7 that need to be addressed. So, to the extent that there are
8 objections pending, I will overrule them as moot.

9 Now, I do want to talk about a couple of things here, as
10 long as we're talking about the Presentence Report. First of
11 all, and I meant to give you a heads up that this was coming, but
12 it's sort of basic. Do the parties -- I've been looking at this
13 Refuse Act statute. What's the parties' position on whether or
14 not there's actually a mandatory minimum here?

15 MR. WRIGHT: Your Honor, we've discussed this, and we
16 believe that you don't have to impose incarceration on that
17 because of the word "or", "impose a fine or incarceration", but
18 if incarceration is imposed, then there is a mandatory minimum.

19 THE COURT: All right. I think Mr. Carey agrees with
20 that and I do, too, having looked closely at the statute, and I
21 have to say that, from the time of the plea until just in the
22 last couple days, I was under the impression there was a
23 mandatory minimum and I may have so advised him at the plea
24 hearing, but when you look at the statute and you see that "or"
25 there, I think, as long as a fine is imposed, incarceration is

1 not required; but if incarceration is imposed, it has to be at
2 least 30 days. So, that's my reading of it. I just wanted to
3 make sure we're all on the same page on that.

4 All right. Let's talk about that both sides are arguing
5 under the -- I forgot to bring out my guidelines -- but I'm
6 pretty familiar with this one, at this point. Both sides are
7 arguing that the plus or minus 2 departures that the notes,
8 comment notes to Guideline Section 2Q1.3 suggest as possibilities
9 either upward or downward ought to apply to -- thank you -- to
10 these three enhancements. Does anybody want to add anything on
11 that, to your written submissions?

12 MR. WRIGHT: Your Honor, I would like to be heard. I
13 think, if we're going to go through those, we believe there's
14 three offense characteristics that apply here and that would
15 specifically counteract or offset any finding that the guideline
16 overall should be brought down because of negligence and,
17 specifically, you've dealt with this in a previous case, but
18 reserving our right to argue for the application of a six-level
19 enhancement for ongoing, continuous, or repetitive discharge.

20 THE COURT: Well, so you're suggesting that -- well, if
21 you're suggesting they're related, then I'll hear from -- we can
22 take up both issues at the same time, I guess is what I'm saying.
23 Both sides approach it from completely different directions,
24 obviously, arguing that the departures should go in different
25 directions, but under different legal theories or different

1 arguments. So, I want to deal with both of these things and we
2 might as well deal with them together. So, I will hear from you
3 on both points.

4 MR. WRIGHT: And, Your Honor, we believe that the Base
5 Offense Level of VI should be applied, obviously, and then the
6 six-level enhancement under 2Q1.3(b)(1)(A) for -- and here's the
7 language: "If the offense resulted in an ongoing, continuous, or
8 repetitive discharge, release, or emission of a pollutant into
9 the environment."

10 We provided the Court earlier, just prior to sentencing or
11 related to Mr. Tis that we incorporated by reference to our
12 argument, and it begins largely by language in the statute. Just
13 as the word "or" is important to the penalty phase of the Refuse
14 Act, we believe the word "or" in the singular nature, as opposed
15 to the plural nature of these words, means something.

16 So, we have one offense here, a Refuse Act violation,
17 resulted in an -- a discharge. That discharge was ongoing,
18 continuous and/or repetitive. Certainly, on January 9th, the
19 MCHM discharged into the river and, on January 23rd, it was seen
20 discharging into the river, and on January 30th, it was
21 discharging at least into the ground into a pipe at that northern
22 end of the facility, if not the river, all of which would
23 constitute a discharge into the environment.

24 There's a case that I came upon yesterday, Your Honor, given
25 to me yesterday, and I didn't cite it to the Court in our earlier

1 memo, but *United States v. Perez*, 366 F.3d 1178, an 11th Circuit
2 case out of 2004, which essentially analyzed these two -- this
3 statute and the -- or this guideline in 2Q1.2 dealing with
4 hazardous materials said that these guidelines do not oppose any
5 additional requirements on the application of the enhancement
6 beyond those contained in the guideline itself. It is not a --
7 worded in a way that provides discretion, it says, if this
8 happened, then increase the offense level by 6. It does allow in
9 the commentary for a downward departure, but at least at the very
10 start, before you even get to the departure, our position is that
11 you have to -- the offense level has to include that six-level
12 increase enhancement for that specific offense characteristic.

13 So, all of those words have meaning. The singular nature
14 and that fact that it is "or", it doesn't have to be more than
15 one offense and it doesn't have to be a repetitive discharge,
16 although we think it was or it would qualify, just a long
17 discharge.

18 Now, we also believe that the nature of the offense here is
19 such that any downward departure should be offset -- essentially,
20 don't do it. That's our argument. Don't make a downward
21 departure from this because of the nature of the offense.

22 And, what happened here is, when you have this ongoing,
23 continuous discharge of MCHM, it requires effort, expense and
24 time, resources, to deal with that. They have to extend a boom.
25 They have to monitor that boom. They hire a company to go out

1 there and put these booms in the water. Then they monitor them.
2 They have manpower. They have to monitor them and replace them
3 if and when they become saturated. That went on well into
4 February of 2014.

5 The discharge at the northern end, it is leaking down
6 through a pipe. That was uncovered because they had to dig a
7 trench, essentially a cleanup or a containment trench to catch
8 that, and they severed into a pipe at the northern end of the
9 facility.

10 The resources involved with digging a trench and extending
11 it a number of yards into the property up through that northern
12 end of the facility is an indication of why, in this particular
13 case, no downward departure should be applied to that six-level
14 enhancement.

15 THE COURT: I just want to clarify something. I knew
16 that, at some point later on, they had been working and they
17 ruptured a pipe and there was some additional MCHM released at
18 that time and that got into the river.

19 MR. WRIGHT: Your Honor, no one on January 30th went
20 down to the river and observed it. When they cut in and severed
21 this pipe, they discovered that water was flowing through that
22 pipe and they took samples from that water. The water extended
23 down the hillside or down the riverbank into what's been called
24 riprap, rocks and other substances. No one followed it and then
25 observed it on January 30th into the river.

1 THE COURT: But that would be in addition to the point
2 source discharge that occurred on the northern end right after
3 the leak?

4 MR. WRIGHT: Yes, sir. That was January 30th. That
5 pipe is in the general area just up on the bank from the point
6 source at the northern end. So, that may well have been the
7 source of the discharge that was seen on January 23rd. It was
8 not seen in the river on January 30th.

9 THE COURT: Okay. Well, that's not really -- what I'm
10 getting at is, that's actually sort of -- that's a related but
11 different event than the actual point source discharge that
12 occurred on the northern end in connection with the leak
13 originally?

14 MR. WRIGHT: It's -- well, it's our position that's the
15 ongoing nature of the continuous or repetitive nature of this,
16 but --

17 THE COURT: Well, I'm not sure we're communicating
18 here.

19 MR. WRIGHT: Yes. I'm not sure of your question, Your
20 Honor.

21 THE COURT: The rupture of that pipe happened on, what
22 day was it, January 30th?

23 MR. WRIGHT: The 30th.

24 THE COURT: 30th. All right. And the leak began on
25 January 9th.

1 MR. WRIGHT: That's correct, Your Honor.

2 THE COURT: And so, there was a northern end point
3 source discharge into the river prior to the pipe rupture on
4 January 30th?

5 MR. WRIGHT: Yes, Your Honor. Now, that -- yes.

6 THE COURT: Okay. But -- and your position is that
7 that continued and was ongoing, including the pipe rupture on
8 January 30th?

9 MR. WRIGHT: Yes, sir.

10 THE COURT: All right. I understand.

11 Mr. Carey?

12 MR. CAREY: Your Honor, if it would be okay with the
13 Court, Mr. Bryant is prepared to address this enhancement.

14 THE COURT: Well, I just realized, before you do, does
15 that conclude your argument, as well, on the plus or minus 2
16 departures that are mentioned in the commentary to each of the
17 enhancements?

18 MR. WRIGHT: It concludes my response with that
19 particular specific offense characteristic.

20 THE COURT: Well, it sounds to me like we're sort of
21 dealing with all of these things at once. So, I -- rather than
22 hearing your arguments piecemeal, I would like to hear the rest
23 of what you have to say about the other enhancements with regard
24 to those particular departures.

25 MR. WRIGHT: Yes, Your Honor. The second enhancement

1 after the six levels under (B)(1)(a) would be (b)(3), which
2 reads, "If the offense resulted in disruption of public utilities
3 or evacuation of a community, or if cleanup required substantial
4 expenditure, increase by 4 levels."

5 Your Honor, here, there were significant -- there was a
6 significant disruption. I don't think that -- there's no doubt
7 about that. To the extent that anyone is pointing, and I'm not
8 -- I'm starting to get arguments mixed up between defendants, but
9 to the extent anyone is arguing that a water company bears some
10 negligence here and, therefore, the disruption of public
11 utilities should not be attributed to the defendant, Your Honor,
12 I would point to a couple of things.

13 First, the language resulted in is not further defined in
14 the statute. There's a Supreme Court case called *Burrage* --
15 B-u-r-r-a-g-e -- v. *United States*, a 2014 Supreme Court case that
16 deals with specifically the phrase "resulted from" in the
17 Controlled Substances Act. That case, in that case, the Supreme
18 Court said "results in -- results from", which is very similar,
19 just a different tense --

20 THE COURT: Well, Mr. -- Mr. Wright, before you go into
21 this argument, Mr. Carey and the defendant have agreed in the
22 plea agreement to this enhancement. So, I don't think you've got
23 an argument coming that the enhancement shouldn't apply. Am I
24 correct?

25 MR. CAREY: That's right, just that it should be

1 reduced because of the negligence of the charge.

2 THE COURT: Right. So, they're not arguing -- they're
3 not arguing -- they're not making a causation argument with
4 regard to this enhancement regarding West Virginia American
5 Water. I didn't think they were and I -- you know, I'm happy to
6 hear your argument, Mr. Wright, but I think you're --

7 MR. WRIGHT: Okay. Well, I'll move on to the part of
8 why, Your Honor, why there should not be a departure and that's
9 because of the scale of the significant disruption here and it's
10 because of the scale of the cleanup expenses. Close to \$2
11 million, I think it will be over \$2 million. Mr. Johns mentioned
12 to us at the hearing, with respect to the Freedom case, that he
13 was going to be writing more checks out of that remediation fund
14 and, if it wasn't at \$2 million, it was going to go over \$2
15 million with his additional checks. That, in and of itself, Your
16 Honor, is a very substantial expense and that's the cleanup right
17 at the site. That's for remediation at the site of the Etowah
18 Facility.

19 That factor, coupled with the tremendous disruption to the
20 economy and people's lives and the anxiety that it's caused here
21 are factors that should weigh against any downward departure for
22 that particular specific offense characteristic.

23 The next one that applies would be under Section (b)(4), "If
24 the offense involved a discharge without a permit or in violation
25 of a permit, increase by 4." Comment Note 7, Subsection (b)(4)

1 notes that it applies or involves a violation or where there was
2 a failure to obtain a permit where one was required," but it
3 added this: "Depending upon the nature and quantity of the
4 substance involved and the risk associated with this offense --
5 with the offense, a departure of up to two levels in either
6 direction may be warranted."

7 Here, Your Honor, we're talking about, in terms of the risk
8 involved, a chemical that was sitting on a riverbank in large
9 quantities, yards from the river, where the events, the
10 negligence, the failure to take action, the failure to implement
11 -- to develop and implement the stormwater plan -- was
12 long-standing conduct, long-standing failure to do what they were
13 supposed to do. As time went on, it just makes things worse
14 because the condition of the plant from 2002-2012 is not going to
15 get any better.

16 Given the type of product that we have, we're not talking
17 about paper products, food wrappers, beer bottles, or garbage, or
18 other things, standard dirt that would qualify as a pollutant.
19 We're talking about chemicals, chemicals that overwhelmed, that
20 we've found out, the filters at the water company. That just
21 heightens the risk involved.

22 So, those two factors, the type of product that went into
23 the river, and the long-standing nature of the offense, are
24 factors that count against the risk involved. It counters any
25 kind of argument for a downward departure.

1 The quantity involved, there were several thousand gallons
2 of this that leaked out. I don't think anyone has any real
3 accurate idea of how many gallons went into the water but, at the
4 hearing on January 27th, there was general agreement that there
5 was at least 7,500 gallons that actually leaked out of the tank.
6 There was certainly enough MCHM that went into the river to cause
7 this significant public disruption.

8 THE COURT: All right. Thank you, Mr. Wright.

9 Mr. Bryant or Mr. Carey?

10 MR. CAREY: Well, we're going to divide it up, if
11 that's okay with the Court. I'll let Mr. Bryant address the
12 enhancement for the continuous discharge. I'll address the
13 arguments of Mr. Wright concerning the other two specific offense
14 characteristics.

15 We have argued in our brief, and the Court has noted in
16 prior sentencings, that the guidelines specifically contemplate
17 -- or specifically state that these guideline ranges and the
18 enhancements are based on knowing conduct and those that involved
19 negligence, a downward departure might be appropriate. We think
20 that's truly appropriate here, where there's no allegation that
21 anyone acted knowingly or intentionally in causing this
22 contamination.

23 It is a case based solely on negligence and strict liability
24 under the Clean Water Act and the Refuse Act and, as a
25 consequence, there is no indication that -- or there's no

1 evidence even that they acted knowingly or intentionally. So,
2 clearly, the invited departure should apply.

3 Now, Mr. Wright argues that, under Section (b)(3), that
4 certain factors obviate against a downward departure, but the
5 actual language of the note states, "This involves an enhancement
6 where a public disruption and evacuation of a cleanup at
7 substantial expense has been required," and that's why the
8 enhancement does apply, but the note says, "Depending on the
9 nature of the contamination involved, a departure of up to two
10 levels."

11 But that seems to clearly indicate, Your Honor, and we can
12 find no cases addressing this note, but it seems to indicate,
13 based on the nature of the substance, here it's MCHM and, as the
14 Court has noted, it caused a Do Not Use order for several days.
15 It was a minor irritant to skin and eyes, and perhaps other
16 related reactions, but there's no evidence of any long-term
17 effect.

18 And so, I do not believe that the enhancement, because of
19 the nature of the contamination, should apply. The nature is a
20 mild one compared to something else that would have been toxic in
21 nature or otherwise dangerous.

22 The same argument applies then to specific offense
23 characteristic (b)(4), "If the offense involved a discharge
24 without a permit", and then it goes on to say, "depending on the
25 nature and quantity of the substance involved and the risk

1 associated." Again, that seems to be speaking towards the
2 substance itself, how much, and was it a bad substance, and how
3 much of it.

4 Yes, there were 7,500 gallons; but, yes -- and, yes, it did
5 result in a disruption, but it's not one where it involved like
6 the Animas River in Colorado, where lead, and arsenic, and other
7 toxic substances clearly were discharged into the river. That
8 may be one of those situations where a departure -- or it
9 obviates against a departure under a negligence prosecution, but
10 this isn't one of those, and I would suggest that Mr. Wright's
11 arguments do not carry today in opposition to the downward
12 departure of a minimum of two, and we think even more might be
13 appropriate, depending on the Court's findings for negligent
14 conduct.

15 And, if there's nothing further, Mr. Bryant will address the
16 continuous discharge argument.

17 MR. BRYANT: Your Honor, with respect to the continuous
18 discharge argument, we have -- we agreed to that in the
19 calculations that are part of the plea agreement and we'll abide
20 by our agreement.

21 However, the Court has raised the inquiry whether this is a
22 -- an appropriate six-level or four-level enhancement under those
23 guidelines and I believe the Court first raised that at the first
24 sentencing in this matter, I believe it was Mr. Herzing, and so,
25 we will be glad to respond to that.

1 Upon further and deeper inquiry and legal research, it --
2 it's our opinion, legal opinion, that the six level does not
3 apply and the reason for that is, there are absolutely no cases
4 that we could find opine the continuous and repetitive guideline
5 based on the facts of a case that are like this one which, as the
6 Court noted at the earlier sentencing, one event, one event that
7 resulted in some of the chemical going into the river beyond one
8 day. We can find no case that has applied a six-level increase
9 for that.

10 Each of the cases that we've read that apply the six-level
11 increase, the facts show that the conduct of the defendant caused
12 specific different acts causing discharge. So, in the Fourth
13 Circuit case *Strandquist*, you have two discharges. The Fourth
14 Circuit approved the six-level enhancement, but in that case, you
15 had the defendant intentionally discharging -- I believe it was
16 sewage, but whatever the substance was -- into the drain system
17 going into the harbor or the water on one day, and then you had
18 them doing it again some days later. So, those are two different
19 events.

20 Every single case we reviewed was like that. They were all
21 like that. There was different conduct by the defendant. It
22 wasn't that there was one event and some following pollution
23 getting into the water. And the Government in its brief cites a
24 number of those cases.

25 Now, the counter to the argument is, one, the language of

1 the guideline itself, but you would think that somewhere along
2 the line in 2016, because these environmental cases have been
3 prosecuted for a long time now, at least 20-some years on a
4 fairly routine basis, that there would be some case law opined to
5 the six-level increase to a case like this where there's
6 basically one spill, one leak, and then the material continued
7 oozing off the bank or into the ground somehow. That's not the
8 case.

9 THE COURT: Mr. Wright?

10 MR. WRIGHT: May I be heard in rebuttal, Your Honor?

11 THE COURT: You may. I also have a question for you.

12 MR. WRIGHT: Okay.

13 THE COURT: I realized, as I was getting ready for this
14 hearing, that I was around for this event and I know generally
15 how long it lasted, but how long was it from the point of the
16 leak, January the 9th, to when everyone's water service had been
17 restored?

18 MR. WRIGHT: Your Honor, I think that was in one of our
19 briefings with respect to the recusal issue.

20 THE COURT: I haven't read that for awhile.

21 MR. WRIGHT: I believe the last date -- neither have I,
22 Your Honor, and that's why I'm going off memory. I'm pretty sure
23 that it was January 17th, but it was a phased-in thing, depending
24 on what neighborhood you lived in.

25 THE COURT: I remember that. I was thinking it was

1 somewhere in the neighborhood of ten days to two weeks, but I
2 couldn't remember exactly. It's not that important, but I must
3 -- I realized I can't put my finger on exactly how long it was.

4 MR. WRIGHT: Your Honor, my memory was it was, at most,
5 eight days.

6 THE COURT: All right. Okay, you wanted to say something
7 in rebuttal.

8 MR. WRIGHT: Yes, Your Honor. I guess Mr. Bryant
9 raises a point about what we might say in rebuttal to his
10 argument, and my first point of rebuttal is, they agreed to it,
11 and now he's making an argument that basically seems to say we
12 don't agree to it. It's a little bit different from saying
13 because of negligence, you should downwardly depart, but to say
14 it shouldn't apply in the first instance is a breach of the plea
15 agreement.

16 Secondly, Your Honor, the commentary on the negligence in
17 cases involving negligent conduct, a downward departure may be
18 warranted. It doesn't say that it should be warranted or is
19 always applicable.

20 The note, Note 6, "depending upon the nature of the
21 contamination", I agree with Mr. Carey, I don't think there are
22 any cases that actually interpret what that means, but it
23 shouldn't mean somebody has to die or somebody has to physically
24 get ill that can be directly linked to contamination. The
25 contamination is into the environment. When it hits the water,

1 the environment has been contaminated in violation of the law.
2 When it's released outside of the containment area, the
3 environment has been contaminated.

4 There are any number of things that would fall short of a
5 chemical actually going into the water plant that would indicate,
6 well, maybe it wasn't as bad or as bad as it could have been. If
7 the boom had been deployed immediately across the river, and I
8 don't know that that would have ever been possible or how long it
9 would have taken, then we wouldn't be talking about the
10 significant public disruption, but the fact is, it did go down
11 the river, it did enter the filters and go past the filters, and
12 disrupt the lives and the economy to a scale unprecedented. That
13 kind of extraordinary event, Your Honor, is a suggestion of the
14 contamination involved. To quote the language of the guideline
15 note means don't downwardly depart because of negligence.

16 MR. CAREY: Your Honor, may I reply briefly? I
17 apologize.

18 THE COURT: You may.

19 MR. CAREY: It's not a breach of the agreement, Your
20 Honor. It was an agreement to calculation non-binding on this
21 Court. After we executed the agreement, we understood it was
22 left open as to Burdette and Reynolds and was disputed in
23 Southern. We understood from the Court's prior statements in the
24 other sentencings that this was going to be an issue determined
25 at the sentencing and, therefore, as officers of the court, we

1 brought to the Court's attention the benefit of our research.

2 And to say that this event is unprecedented, just in the
3 last few years, you've got Flint, Michigan; you've got the Animas
4 River; you've got the BP oil spill, exponentially greater damage
5 and disruption. So, I just dispute the characterization of the
6 event, Your Honor.

7 THE COURT: All right. First of all, I would note that
8 I take responsibility for raising the issue, because I did, and
9 that puts the defendant in an awkward position and I'm not going
10 to hold that against him.

11 With regard to the issue of ongoing and continuous, frankly,
12 this is a difficult issue. I think it's a close call and it's --
13 part of the problem is that this is a guideline that isn't used
14 very often and there's not been a lot of development of case law
15 on it, especially in the context of negligent activity.

16 To me, what is from a legal standpoint the deciding factor
17 in this is the comment, although it's getting to Comment 3,
18 although it's getting to a different point, and that's that
19 departure, it says that "the specific offense characteristics in
20 this section assume knowing conduct."

21 Well, when you view specific offense characteristics,
22 (b) (1), through that lens, it makes a lot more sense. If you've
23 got knowing conduct going on, somebody who is intentionally
24 discharging pollutants into the environment, then it's easy to
25 understand what it means to be ongoing. It's easy to understand

1 what it means to be continuous or repetitive.

2 It's much harder to understand that, in a negligent context,
3 where you've had what is essentially an accidental discharge that
4 is the result of negligence. It's harder then to understand how
5 the terms "ongoing and continuous" apply, and they're clearly
6 there.

7 I'm not suggesting -- certainly not suggesting that those
8 words aren't in play here -- but this is a situation where
9 basically one leak occurred. The defendants became aware of it
10 fairly quickly and acted, certainly arguably ineptly, but
11 immediately, to try to do something about it, and that took
12 awhile. It took it awhile to stop the leak, took it awhile to
13 get it to stop going into the river, and it certainly took it
14 awhile to clean it up, but it's hard for me to say that that's in
15 the context of negligence, or less; and, by that, I mean strict
16 liability. It's hard for me to say that that's something that's
17 ongoing or continuous.

18 One thought I have on that is, okay, where do you draw the
19 line? At what point is it not ongoing and continuous? When
20 you've got fluid leaking out of the container and running down a
21 bank, you know, even for five minutes, that could be seen as
22 continuous and ongoing, and I don't think that that's necessarily
23 what this guideline is getting at.

24 Or, conversely, you could say that it would only not be
25 ongoing and continuous if you, say, dropped an open container of

1 something into a river on a one-time basis. I think those are
2 too -- too constricted. Those examples are too constricted, but
3 it's difficult to know where to draw the line here in terms of
4 negligent conduct.

5 The cases that I have seen almost uniformly relate to
6 knowing conduct, which means they're really not very helpful and,
7 in the end, and I don't know if this is directly applicable on
8 this or not, but I go back to the Rule of Lenity. On a close
9 call where it's not clear, you give the defendant the benefit of
10 the doubt. And so, that's my ruling on this.

11 I'm going to overrule the Government's -- at this point, I
12 think, procedurally where we are is the Government's objection,
13 because the Presentence Report has a plus 4, and so I will
14 overrule that objection and sustain the position of the probation
15 officer on that.

16 Now, with regard to the plus or minus 2 departures that are
17 suggested in the application notes, my understanding was that the
18 Government was arguing for a plus 2 on each of those offense
19 characteristics and that these upward departures should negate in
20 any downward departure, as opposed to knowing conduct under Note
21 3. On the other hand, the defendant, at least in the briefing,
22 contended that Note 3 should be effectuated by applying the minus
23 2 downward departures under Notes 4, 6 and 7.

24 I have a different view of this. I think Note 3 is separate
25 from Notes 4, 6 and 7. Notes 4, 6 and 7, frankly, provide little

1 guidance on when a departure should apply. It is, of course,
2 discretionary and, because there's not a whole lot of guidance,
3 it's difficult to assess whether or not they should apply either
4 upward or downward.

5 Further, the parties stipulated to a calculation involving
6 none of these departures to individual offense characteristics
7 and there's no mention in that agreement of these potential plus
8 or minus 2 departures. Nobody reserved the right to argue those.
9 Now, I'm not saying you couldn't, but it seems to me that what
10 the parties agreed to is significant, notwithstanding that the
11 defendant agreed to the plus 6 on (b) (1).

12 Thus, although the Court is not bound by the agreement on
13 the guidelines, the Court finds that it is instructed that the
14 parties did not reach an agreement for departures under, or take
15 into account departures, any arguments for departures, on Notes
16 4, 6 or 7. Since both sides are arguing the opposite sides of
17 those departures and, in light of that agreement, I'm not going
18 to depart upward or downward under Notes 4, 6 or 7.

19 Now, I do note that the departure for negligence under Note
20 3, while discretionary, is clearly applicable in this case based
21 on the charges and, as I have noted previously, it is
22 unfortunately entirely undefined and standardless. So, those are
23 my rulings on those issues.

24 Now, I believe -- I don't think my rulings are changing the
25 Presentence Report at all, are they?

1 Mr. Lambert, have you been --

2 PROBATION OFFICER LAMBERT: I don't believe that they
3 have.

4 THE COURT: All right. So, I will adopt the
5 Presentence Report, most recent edition of the Presentence Report
6 and addendum, and I will order that it include Mr. Carey's
7 letter, as written.

8 I would note that I've received sentencing memoranda from
9 both sides.

10 I also received a number of letters from Mr. Carey, which I
11 have read.

12 Mr. Carey, do you have a redacted version of those for
13 placement on the record?

14 MR. CAREY: Yes, Your Honor, and I believe they were
15 submitted in addition to the un-redacted ones. If they weren't,
16 I will make sure they are.

17 THE COURT: I don't know who has the redacted ones.
18 Does anybody? I've got the -- I've got the original un-redacted
19 ones here.

20 MR. CAREY: We'll make sure you have one for filing,
21 Your Honor. I thought that was already taken care.

22 THE COURT: Okay. I'm informed that we have the
23 redacted copy in chambers. Do you want those placed on the
24 record?

25 MR. CAREY: Yes. You can place the un-redacted -- I

1 mean the redacted versions on the record.

2 THE COURT: All right. Very well.

3 Is there any objection to that?

4 MR. WRIGHT: No, Your Honor.

5 THE COURT: All right. That will be so ordered.

6 I also received some other materials in the last couple of
7 days. One is a letter from a Lori Magana. Another one is an
8 essay that was purported to me, although there's nothing on here
9 to indicate even who wrote it, but apparently, maybe it's a
10 college entrance essay that relates to the water crisis, and
11 then, finally, an e-mail from -- I guess it's from Maya Nye
12 attaching a -- an e-mail from someone else regarding their
13 experience with the water crisis.

14 You know, any thoughts -- first of all, has anybody seen any
15 of this stuff?

16 Oh, by the way, there's one other thing, too, while I'm
17 thinking about it. Literally five minutes before the hearing was
18 scheduled to start, I received a letter from someone named
19 Pignato. I don't know who this is. I received it five minutes
20 before the hearing and, therefore, I haven't read it and I have
21 no intention of doing so. I will place it into the record, if
22 anybody wants me to. I wanted to let you know I got it.

23 It's not short. It's -- it includes a two-page letter and
24 then a bunch of materials and I haven't had a chance to review
25 it. To the extent that it's appropriate for me to be receiving

1 materials like this at all from somebody I can't even identify,
2 I'm certainly not going to read them if I receive them five
3 minutes before a hearing.

4 So, I'd like to hear what the parties have to say about
5 those materials. And I have read the other materials.

6 MR. WRIGHT: Your Honor, the college essay was
7 submitted through Ms. Nye to our office from a person who was
8 here and was affected by the water crisis and was a victim and
9 moved out of state. I don't have her name right here. Ms. Nye
10 is in the courtroom and she does want to speak.

11 THE COURT: Well, we'll get to that.

12 MR. WRIGHT: And perhaps she can bring up the name. I
13 can't find the cover e-mails. I don't have her name handy.

14 Mr. Pignato handed the letter to us just right before the
15 court hearing, Your Honor. He is a resident of this area and was
16 a victim of the so-called water crisis. So, I take this as a
17 victim impact submission as similar to all the others. So, I
18 would ask that that be made part of the record, as well, Your
19 Honor.

20 MR. CAREY: Your Honor, the essay and the other
21 materials that have been previously provided, we don't have any
22 objection to having them part of the record as a Victim Impact
23 Statement. I would object to the one that was turned over five
24 minutes before. I haven't had a chance to even read it in its
25 entirety. I don't think that it's appropriate for the Court to

1 include it in the record given the timing of it. It's possible
2 that it would raise issues that would require me to ask for a
3 recess and, you know, address if the Court would give any
4 consideration at all to considering it. So, I -- the Court has
5 indicated it's not going to read it, not going to consider it
6 and, in light of that, I ask that it not even be made a part of
7 the record.

8 THE COURT: Mr. Wright, do you have any objection to
9 that?

10 MR. WRIGHT: Well, Your Honor, I would -- there is one
11 more sentencing and I would ask that the Court consider, and I
12 will forward this, a copy of this to the defense counsel for the
13 next defendant. So, I would ask that it be made a part of the
14 record at least for that case, and that is this case.

15 THE COURT: Well, I'll ask you to go ahead and forward
16 it to Mr. Southern's counsel. At least one of them is in the
17 room right now, so they are now on notice of it, but I don't
18 think -- and, first of all, I'd say that under -- I don't know
19 exactly what deadlines were provided on the website or whatever,
20 but this has got to be untimely for this hearing, so I -- and
21 I've had no opportunity to read it, nor do I think I should. I'm
22 not going to include it in the record in this case and I'm not
23 going to read it for this sentencing.

24 The other matters, I take it, there's no objection? Is that
25 including the letter from Lori Magana?

1 MR. CAREY: I'm not sure we've seen that one, Your
2 Honor.

3 THE COURT: I've had a trickle of stuff coming into my
4 chambers over the last few days.

5 MR. CAREY: I know I haven't reviewed anything today
6 and Phil said it came in today. So, the Nye stuff was provided
7 -- to the extent that we haven't seen it, Your Honor, I would
8 object to its inclusion, as well.

9 THE COURT: Well, it's similar to -- I would say the
10 one I'm not putting into the record and I haven't read may not be
11 similar to the other things I've seen. This one is pretty
12 similar to some of the other Victim Impact Statements. I've read
13 it. I am going to put it into the record because I have.

14 MR. CAREY: That's fine.

15 THE COURT: So, I will order that all of these things
16 be placed into the record.

17 **GOVERNMENT EXHIBIT 1 ADMITTED**

18 THE COURT: I would note for the record that the rest
19 of the victim materials that were submitted and are referenced in
20 the Presentence Report were placed in the record in the Reynolds
21 sentencing, during the Reynolds sentencing hearing, and is on the
22 public docket in his case and, unless there's an objection, I
23 intend to simply -- I'm obviously aware of those materials and I
24 simply mention those by reference. I don't see any reason to
25 place them into the record in this case unless there's an

1 objection.

2 MR. WRIGHT: No objection.

3 MR. CAREY: No objection, Your Honor.

4 THE COURT: All right. On August 18th, 2015, the
5 defendant appeared before this Court and entered a plea of guilty
6 to Counts Two and Three of a 15-count second superseding
7 indictment. Count Two charges him with unlawful discharge of
8 refuse matter in violation of 33 U. S. C. Sections 407 and 411.
9 Count 3 charges him with negligent violation of a Clean Water Act
10 permit condition in violation of 33 U. S. C. Section
11 1319(c)(1)(A), 1311, and 1318.

12 I deferred a factual basis finding at the time of the plea
13 hearing. I now will find a factual basis. I will adopt the
14 findings I made in other hearings as my findings.

15 The one note I would make is that, having reviewed Count
16 Three, I'm not a hundred percent convinced that the portion of it
17 under Section 1318 is -- I'm not real convinced by that, that
18 that -- the stormwater and groundwater plans would implement a
19 record keeping statute.

20 Now, I do think it's sufficient for 1311, so I'll make the
21 factual basis finding. If it was based solely on 1318, I'm not
22 so sure I would find a legal basis for it, but since 1311 -- I
23 think it is satisfactory for 1311.

24 So, is there any objection for me finding a factual basis
25 based on those comments?

1 MR. WRIGHT: No, Your Honor.

2 MR. CAREY: No, Your Honor.

3 THE COURT: All right. I will, therefore, adjudge the
4 defendant guilty of both of those crimes and accept the plea
5 agreement that was previously filed.

6 I'm now ready to give my tentative findings as to the
7 applicable guidelines.

8 First, Mr. Wright, is there a motion for the third level for
9 acceptance of responsibility?

10 MR. WRIGHT: There is, Your Honor.

11 THE COURT: That motion will be granted.

12 Therefore, I find a Base Offense Level of VI; plus 4 for the
13 discharge of a pollutant; plus 4 for the disruption of a public
14 utility; plus 4 for a discharge in violation of permit, for an
15 Adjusted Offense Level of 18; minus 3 for acceptance of
16 responsibility, for a Total Offense Level of 15. That is before
17 a departure under Note 3, but with a Total Offense Level of 15
18 and a Criminal History Category of I based on 0 points, I find an
19 imprisonment range of 18 to 24 months; 1 year of supervised
20 release; a fine range of \$2,500.00 to \$200,000.00; and a
21 mandatory special assessment of \$50.00, which I note has been
22 paid.

23 I would also note -- now, that's it for the guideline
24 findings.

25 Are there any legal objections to my tentative findings as

1 to the applicable guidelines?

2 MR. WRIGHT: No, Your Honor.

3 MR. CAREY: No, Your Honor.

4 THE COURT: All right. Let's talk about restitution.
5 And before we get into those, the number has changed slightly
6 that the State is claiming; is that correct, Mr. Wright?

7 MR. WRIGHT: Yes, Your Honor.

8 THE COURT: And let me see if I've got the number
9 correct. \$29,320.72?

10 MR. WRIGHT: Yes, Your Honor.

11 THE COURT: And that's based on the expenses incurred
12 by the DEP that was originally claimed to include regular
13 salaries and the Government took the position that regular
14 salaries, as opposed to overtime should not be claimed, and
15 reduced it down to that number.

16 MR. WRIGHT: That's right, and there were some slight
17 adjustments to the "Other" category, quote, "Other" on the
18 invoice and I think the mileage changed slightly.

19 THE COURT: All right. Well, this raises a question
20 that I've been wanting to ask in these hearings and didn't really
21 have occasion to ask, but I think is probably on the minds of a
22 lot of people who are watching this, and that is, for all the
23 years leading up to this leak, where was the DEP?

24 MR. WRIGHT: Well, Your Honor, they do not go out and
25 -- for resources, but I also think, because of mandate, they

1 don't go out and look at the SWPPP, or the stormwater plan, for
2 every facility. There are just too many for them to do that.

3 THE COURT: Do they look at some?

4 MR. WRIGHT: They are supposed to. At least the law
5 was, at the time of the stormwater plans or the permit was
6 switched from Pennzoil, the previous owner, to the Etowah
7 Facility, they were supposed to submit it to the DEP. I'm not
8 sure. I think the law has changed. I think they have to have it
9 available, but I don't know that they -- they don't go out and
10 physically look at all those plans at the sites. I think the
11 plan has to be submitted and then, when they're renewed, they
12 have to certify that they have one.

13 THE COURT: Do they ever go out and look at sites?

14 MR. WRIGHT: They do, Your Honor, but there are just so
15 many sites and the resources, I think, for the particular
16 division they'd have to inspect, they can't hit every single one
17 on any kind of a regular basis.

18 THE COURT: I understand.

19 Does the defendant have anything to add on that question?

20 MR. CAREY: I would just note, in relation to Mr.
21 Wright's comment, that in 2001, when the permit was transferred
22 from Pennzoil to ERT, they did have to submit to the DEP an SWPPP
23 and a Groundwater Protection Plan as part of the application and
24 it had been, as I understand it, reviewed and approved by the
25 DEP. That obviously did not take place. That's when --

1 THE COURT: Well, is that maybe because there was
2 already one in place with Pennzoil before or --

3 MR. CAREY: We don't know that.

4 THE COURT: Or maybe we're assuming there was one in
5 place before.

6 MR. CAREY: I think we're just assuming because, as I
7 understood Mr. Wright, I don't know the expanse of his grand jury
8 subpoena, but they obtained the files from the DEP of --
9 concerning Etowah River Terminal and there was no plan except for
10 what they -- has been identified as the "Draft Plan" and that may
11 have been acquired on the day of the leak from the offices of
12 Freedom. We're not blaming the DEP, but that is one of the
13 safeguards.

14 And, in 2009, when an employee of or the consultant for
15 Freedom submitted the application for the renewal of the permit,
16 he made the affirmative representation there was one in place and
17 on-site. He just assumed there was and did not check. That's
18 part of the underlying negligence in this case, but it's a -- you
19 know, that safeguard, to the extent that it's required to be
20 filed and approved by the DEP, it did not occur.

21 THE COURT: Do we agree that the -- if I were to impose
22 restitution in this case, the sole authority for that is my
23 discretion to impose it as a condition of some sort of
24 supervision?

25 MR. WRIGHT: We agree, Your Honor. I agree. I don't

1 think there's any statutory basis to enter an order of
2 restitution independently of the conditions of probation or
3 supervised release.

4 THE COURT: Is that your understanding, as well, Mr.
5 Carey?

6 MR. CAREY: It is, Your Honor, but when you refer to
7 restitution, are you referring to the DEP's --

8 THE COURT: That's the only thing that's at issue.

9 MR. CAREY: All right. Yes, I agree with your
10 statement and Mr. Wright's.

11 THE COURT: Well, here's where I'm coming from on this.
12 I -- as I have spent a lot of time with these cases over the last
13 few weeks, the question I keep coming back to is, why didn't the
14 -- why wasn't the DEP out there looking at this place? And I
15 realize that there's probably a resource issue and you can't --
16 probably can't -- the DEP can't probably go out and inspect every
17 single facility that has one of these form permits, but this
18 facility went for over a decade and, you know, we're all very
19 familiar with what happened, what didn't happen, and the results,
20 but we're talking about a facility that was storing chemicals a
21 mile and a half up the Elk River from an input for a community
22 water system that served an awful lot of people and it's also at
23 a location that's very close to the State Capitol. I don't know
24 where the DEP's headquarters is, but I'm get guessing it's
25 somewhere in Charleston; is that right?

1 MR. WRIGHT: It's in Kanawha City, Your Honor.

2 THE COURT: All right. So, less than ten miles away
3 from the DEP's headquarters, and they -- I have no evidence that
4 they ever went out and looked at this place. They took Mr.
5 Reynold's word for it on the application that they had these
6 plans in place which, you know, I guess when you're dealing with
7 a large volume of renewal applications, you can understand that,
8 but it just seems to me that somebody with DEP should have gone
9 out there at some point and looked at this place and, from what
10 I've learned about this case, if somebody really knew what they
11 were doing in terms of the environment and the requirements for a
12 facility like this, if they walked out there and walked onto this
13 facility, the problems would have been obvious, and they didn't
14 do that.

15 And I'm not necessarily casting blame on any person in
16 particular. I understand there are probably only so many DEP
17 inspectors, only so much that can be done. Maybe there was a
18 policy issue. Maybe this has been dealt with to some extent
19 legislatively since this incident. I haven't studied that
20 closely.

21 But the bottom line for me is that, for this particular
22 facility and in terms of the proximity to other resources and
23 infrastructures, it is troubling enough to me that the DEP was
24 never there, that I am not going to include restitution in this
25 case. So, I think that's the price the State pays for not having

1 done that.

2 So, I am not going to impose any restitution as a condition
3 of any sort of supervision in this case and you can note any
4 objection that you might like to for that at this time.

5 MR. WRIGHT: Your Honor, I would ask that the Court
6 note my objection.

7 THE COURT: It is so noted.

8 All right. Mr. Wright, we've reached the point where I'm
9 going to ask you if all victims have been accorded their various
10 rights and notifications under the various Victims Rights
11 statutes and notifications?

12 MR. WRIGHT: Yes, they have, Your Honor.

13 THE COURT: And I think you indicated previously that
14 Ms. Nye wishes to address the Court. Does anybody else?

15 MR. WRIGHT: Not that I'm aware of.

16 THE COURT: All right. Somebody is raising their hand
17 in the back. I have no idea who it is.

18 MR. RODNEY WILSON: You had mentioned if anybody would
19 like to address the Court on the things that are going on as far
20 as sentencing. I'm a --

21 THE COURT: Hang on a second. I'm not saying you're
22 getting to address the Court.

23 MR. RODNEY WILSON: Oh, I'm sorry.

24 THE COURT: I want to know who you are.

25 MR. RODNEY WILSON: My name is Rodney Wilson. I'm a

1 friend of Denny Farrell's.

2 THE COURT: Well, I think you need to make sure you've
3 talked to his counsel first before that. I want to talk to Mr.
4 Wright.

5 You don't have anybody else that intends to address the
6 Court?

7 MR. WRIGHT: I've only been aware -- I'm only aware of
8 Ms. Nye wanting to address the Court, Your Honor.

9 THE COURT: All right. And, Mr. Wright, can you give
10 me a little bit of a preview of what Ms. Nye's presentation might
11 be because I -- I want to make sure that what I -- I don't have
12 any idea what I'm going to hear or what the presentation is going
13 to be like and I want to make sure that it's reasonable.

14 MR. WRIGHT: I think it's going to be the impact that
15 this had on the community, perhaps her personally, but I think
16 more on the community, but I haven't asked her specifically to
17 tell me what she wanted to address.

18 THE COURT: How long do you think this is going to
19 take?

20 MR. WRIGHT: Ten minutes, Your Honor.

21 THE COURT: Well, I'm going to ask her to try to keep
22 it to five, but I'm not going to put a clock on her either. So,
23 I will ask her to come forward and she may address the Court from
24 the podium.

25 By the way, I'm not sure that I have to do this because,

1 given the position the Government has taken regarding victims in
2 the case, and restitution and whatnot, I'm not sure that I have
3 to do this, but because there's only one person that wishes to
4 address the Court, and it appears that it would be a reasonable
5 presentation, then I think it's an appropriate use of time. So,
6 I will allow it to occur.

7 Ms. Nye, you may come forward.

8 Does anybody want to have her placed under oath?

9 MR. CAREY: No, Your Honor.

10 MR. WRIGHT: No, Your Honor.

11 THE COURT: Ms. Nye?

12 (Statement given by Maya Nye.)

13 THE COURT: Thank you, Ms. Nye.

14 MS. NYE: Zuri Barnes was the name of the young woman
15 who submitted the essay. She was a student of mine.

16 THE COURT: All right. Very well.

17 MS. NYE: Can I give these to the Court?

18 THE COURT: Well, here's the thing, Ms. Nye. You
19 submitted the letter earlier, so you know how to send stuff in to
20 the Court. We're having a sentencing today. I don't have time
21 to read that, so I'm not going to accept it for this hearing, and
22 you're well aware another one is coming up. If you want to
23 submit it for the next hearing, you may, but, you know, it's
24 untimely for this hearing, so I'm not going to accept it.

25 MS. NYE: Okay. I will, Your Honor. Thank you.

1 THE COURT: All right. Under the circumstances, I
2 suppose I need to give counsel an opportunity to respond, if they
3 wish, both sides.

4 MR. WRIGHT: Your Honor, I don't have anything to add
5 at this point on that.

6 THE COURT: Fair enough.

7 MR. CAREY: Your Honor, I think I can address my
8 response to the comments made by Ms. Nye in the comments that I
9 plan to make on behalf of Mr. Farrell and it may lengthen it a
10 little bit, but I'll address it then. I think it's better to do
11 so then.

12 THE COURT: All right. I appreciate that.

13 I guess the only comment I would make, and I think that it
14 was appropriate, in fairness, to hear from Ms. Nye, but I want to
15 point out that my perspective is that Ms. Nye was not under oath.
16 Therefore, she was not testifying. Her statement was not
17 evidence for the Court.

18 Moreover, much of what she said would be in the nature of,
19 if anything, legal argument, or analysis, or expert material that
20 has not been subjected to the adversary process, the Rules of
21 Evidence, or presented through counsel. So, I'm happy to hear
22 her comments, but I think that they have to be placed in the
23 proper context for this proceeding, and that's all I have to say
24 about that.

25 All right. Mr. Farrell, at this time, the Federal Rules of

1 Criminal Procedure give you the right to make any statement that
2 you would like to make, although you're not obligated to make any
3 statement. However, if you do choose to make a statement, I
4 would ask that you stand to do so.

5 THE DEFENDANT: Thank you, Your Honor. First, let me
6 say, I truly accept -- I truly acceptance of responsibility for
7 the spill. As owners and executives of Freedom Industries, Chip,
8 Bill, Gary, myself, we were -- we were responsible for operations
9 of the facilities and we were responsible to oversee the quality
10 and completeness of all the employees for the tasks that they
11 were assigned. I accept the responsibility. I'm truly sorry for
12 what happened and I'd like to apologize to the community as a
13 whole.

14 I never intended for this to happen. I can assure you, I
15 have learned a lot since this event. I worked very hard over the
16 years to get Freedom Industries started and I helped build
17 Freedom Industries to the point that it grew when it was sold.

18 Freedom provided over 30 good-paying jobs that have all been
19 lost because of this event. I want to apologize to you, Your
20 Honor, to the public, and to all those employees who worked so
21 hard towards our success.

22 When I sold Freedom Industries, I had a plan that I would
23 work three years and get my earnout and then maybe retire. All
24 of that has been lost, Your Honor. All the work, all the dreams,
25 15-plus years, gone in an instant. For that, I apologize.

1 My ability to find work going forward has been made much
2 more difficult because of this spill. My hope was -- I just -- I
3 wish I could go back with the knowledge I have now, for the
4 knowledge I have now from this event. I assure you I would have
5 acted different, much different. I can assure the Court I will
6 never be put in this position again and I will never forget the
7 lessons that I have learned throughout this process. Thank you.

8 THE COURT: Thank you, sir. You may be seated.

9 Mr. Carey, anything else on behalf of the defendant?

10 MR. CAREY: Yes, Your Honor. I guess they don't want
11 me to talk long because there's no more water.

12 Mr. Farrell stands convicted before this Court of two
13 misdemeanors, a violation of the Refuse Act and a violation of
14 the Clean Water Act, and the factual basis for that plea, which
15 the Court is well aware, recognizes that as an owner, officer,
16 and director of Freedom and its related companies, he was a
17 responsible corporate officer under the law and, in that
18 capacity, he failed to ensure that the stormwater plans were
19 developed and implemented, and that failure was a cause in the
20 contamination because the secondary containment system failed to
21 keep the MCHM from reaching the river.

22 The Court now must decide the appropriate sentence for Mr.
23 Farrell and, under Section 3553, the Court must impose a sentence
24 sufficient, but not greater than necessary, to comply with the
25 statutory purposes of sentencing in the federal system. I

1 believe that there are two for appropriate -- appropriate for
2 discussion, at this point, Your Honor, and that is the need to
3 promote consistency in sentencing and, also, to provide
4 deterrence to others who are in similarly situated circumstances.

5 Of all the defendants in this case, I believe that Mr.
6 Farrell is virtually identical to the circumstances of Mr. Tis
7 and Herzing. All three had a background in the sale and product
8 development in the chemical industry and came together in the
9 mid-90s to form Freedom Industries.

10 From the beginning, each of them shared equal ownership.
11 While, in terms of Freedom, there was some minority interest,
12 they had the bulk of the stock. In 1999, they formed Poca
13 Blending to further their activities and, in 2001, they acquired
14 Etowah River Terminal and jointly owned that between the three of
15 them. They were the only owners of ERT and they were all
16 officers and they were all directors. Thus, all three had equal
17 authority and responsibility for the operation of ERT and that
18 does distinguish them from Mr. Farrell -- I'm sorry, Mr. Reynolds
19 and Mr. Burdette -- who had certain responsibilities, but did not
20 have attending authority. Therefore, because they had equal
21 ownership, they had equal share in the success. They also had
22 equal responsibility to operate ERT in compliance with the law.

23 But importantly, all three had to make the decisions
24 jointly. They had to approve the hiring of each person that was
25 added and, in particular, Reynolds, Burdette and Southern. All

1 three had to approve any expenditures over \$5,000.00.

2 So, the question is, as between Mr. Tis, and Herzing, and
3 Mr. Farrell, should they be treated differently? Well, what are
4 the differences in those sentencings?

5 First, Tis and Herzing pled guilty to one count; whereas,
6 Mr. Farrell has pled guilty to two, but the pleas are based on
7 their positions as responsible corporate officers. It involves
8 the same conduct, failure to develop and implement the stormwater
9 plans. They face the same guideline calculations and has the
10 effect to simply increase -- his two counts have the effect of
11 increasing his maximum exposure, the mens rea strict liability
12 for a Refuse Act violation but, as Mr. Tis's own lawyer said --
13 I'm sorry, Mr. Herzing's own lawyer -- they didn't exercise
14 sufficient due care. That's the standard of negligence.

15 It's also been suggested that Mr. Tis and Herzing lived in
16 Pittsburgh and, therefore, perhaps didn't have the same
17 opportunities. And, if we were talking about a single event
18 which developed and occurred within a very short period of time
19 to which they had no reason to know then, yes, if Mr. Farrell did
20 have reason to know and didn't do something about it then, yes,
21 maybe he should be treated differently.

22 But we're talking about the failure to implement a plan
23 dating back to its origins in 2001 and continued during the
24 entire time that all three of them owned it up until the sale.
25 It also involved the failure of the containment system to hold

1 back the leak and, as the Court has noted, we believe that a
2 majority of it not went through the cracks of the wall, but went
3 below the tank, underneath the wall and out, and we believe that
4 it followed a trench that had formed under a stormwater pipe.
5 That is a condition which had existed for quite sometime and with
6 which Mr. Tis and Herzing were personally aware.

7 They indicated that they came down once a quarter. We
8 believe it's more often, but accepting their numbers, that's four
9 times a year, times 12 years, that's 48 trips to the site. They
10 were also in regular contact by phone and e-mail and they
11 participated by phone at times in the weekly management meetings.
12 They received detailed minutes of these meetings from Mr.
13 Burdette and, if you've seen any of them, you know that they are
14 very detailed.

15 In May of 2009, Mr. Burdette sent minutes to Mr. Tis and
16 Herzing saying there was a need to update the stormwater plans.
17 They didn't say what plans.

18 As to the condition of the wall, Mr. Burdette forwarded them
19 a Visions Report that said, quote, "General damage that could" --
20 noted "General damage that could impact containment."

21 And, as to the wall itself, Mr. Farrell -- I'm sorry, Mr.
22 Burdette said he sent e-mails to Tis and Herzing, as well, about
23 these things. So, Tis and Herzing had every opportunity to know,
24 just as Mr. Farrell did.

25 And, in terms of Mr. Farrell's day-to-day activities while

1 he was on-site, as the Court has seen from the pictures, I
2 believe, the office was separate and apart from the tank farm.
3 It was nearby, but his job was dealing with suppliers and buyers,
4 and so, he was on the phone placing orders, traveling to customer
5 sites. He did not regularly walk through the tank farm.

6 There is one important point, and I want to make it not as
7 an argument that he should be exonerated, but it puts it in
8 context that he did attempt to do something that may have -- and
9 I say "may have" because I don't think we can know, ever know --
10 but it may have had an impact on the amount of material that
11 reached the water and that involves the fixing of the stormwater
12 pipe.

13 Now, if I may indulge the Court, this is a photo that Mr.
14 Wright has previously provided to the Court.

15 May I approach, Your Honor?

16 THE COURT: You may.

17 MR. CAREY: Phil, do you want to come with me? If I
18 may, Your Honor, I'm going to be talking about this stormwater
19 pipe here. All right?

20 That shows up just to the right of this red brick building,
21 and below the wall, and here's 396. All right? This is a
22 picture that was taken after the leak was discovered, and I'm not
23 representing and, in fact, I will tell you, it doesn't accurately
24 reflect the day of the leak because there had been some
25 excavation done trying to get down to the water and the MCHM and

1 soak it up, but for many years, you could see the top of the --
2 of this pipe sticking out of the ground and it was the water that
3 was flowing underneath this pipe that ran during the driest of
4 summer days and caused this trench to go down the river and we
5 believe that's where the majority of the materials flowed.

6 And so, that was a condition that, according to the pipe
7 manager that preceded Mr. Burdette, Mr. Farrell told him when he
8 was hired, "That is one of the three main issues that I want you
9 to fix."

10 And I'll show you, Judge, in this picture, this square is
11 the intake culvert. There's sort of a collection ditch dug here.
12 Here's the railroad, and then the road, Barlow Drive, Barlow
13 Road, right in this little depression area collected the water
14 and, when it rained, it took it from this culvert -- and this
15 dotted line is that pipe that sticks out -- and goes underneath
16 the property.

17 Mr. Farrell indicated to the prior plant manager that he
18 wanted the erosion of the banks fixed and Mr. Burdette indicated
19 that, at that time, they planned to put a camera below that pipe
20 in the hope of determining what was the cause of that ongoing
21 water flow.

22 Well, they obtained estimates upwards of \$280,000.00 to fix
23 it and Mr. Tis and Mr. Herzing came to the site. Mr. Herzing
24 walked the bank, went down and looked at this area of erosion,
25 and indicated -- or came back into the office and looked at an

1 aerial photo and said, "It hasn't changed in all of these years,
2 we're not going to spend the money."

3 Now, that doesn't exonerate Mr. Farrell. He is responsible
4 for the condition of that facility on January the 9th, to the
5 extent that his prior actions before he sold it led to those
6 conditions. It's just a way of putting his role into context.
7 Had that bank been fixed at that time and had they determined the
8 cause, maybe that point source would not have been created.

9 Now, that brings us to the only difference then that I see
10 between Mr. Tis, and Mr. Herzing, and Mr. Farrell, and that is
11 that they do have the benefit of a 5K motion, and that was for
12 their testimony in this case. Now, I'm not saying that they
13 should not have received it. What I'm saying is, the opportunity
14 for Mr. Farrell was different. He was facing multiple civil
15 suits, which Tis and Herzing, for whatever reason, were not, and
16 so a plea of guilty to a negligent discharge under the Clean
17 Water Act resulting in contamination would have had res judicata
18 effect and exposed him to ruin as to judgments without any
19 defense. And so, we did our best to limit his exposure under
20 those civil cases.

21 He was also tied up in the proceedings in the bankruptcy
22 case. And, once we did settle one of the class action cases and
23 reach agreement on one of the other state cases, we did turn our
24 attention to resolving this case. It's not the only reason, but
25 it is a reason. And so, as the last one in, he doesn't have such

1 a motion. So, the question is, in sentencing him, is probation
2 appropriate without a 5K motion?

3 This Court has graciously provided to us updated information
4 concerning the sentencings of individuals who are convicted under
5 the Clean Water Act and some of that data indicates that in 2014,
6 of those who pled strictly to misdemeanor violations, 90.7
7 percent of them received either a fine or probation. Another .8
8 percent of them received some combination of probation and
9 confinement, and I assume community or home confinement, and only
10 6.5 percent went to prison.

11 Another example is the Deep Horizon case, a case that
12 everyone is aware of, unfortunately, resulting in the deaths of
13 11 people and untoward damage to the ecosystems of the Gulf.
14 Some of those people got prosecuted for felonies for destruction
15 of documents. They received probation. The person who pled
16 guilty to the Clean Water Act violation for polluting the Gulf
17 with oil entered into an agreed-to sentence with the U. S.
18 Attorney's Office for ten months of probation, a \$50,000.00
19 contribution to a wildlife fund, and a hundred hours of community
20 service.

21 Those statistics, that case, reflects what we, as a society,
22 have chosen to punish those people committed -- who have
23 committed negligent acts resulting in some harm. But even in
24 West Virginia, if you want to draw a comparison, the negligent
25 homicide statute which applies to a person who operates a car

1 and, through his reckless disregard for the safety of another
2 kills a person is charged with negligent homicide, but the
3 statute itself says it requires actually more than negligence.
4 It says, "The negligent homicide statute requires the driving of
5 a vehicle in reckless disregard for the safety of others, and
6 this means that more than negligence is required." Even
7 negligent homicide is a misdemeanor punishable of up to a year in
8 jail, but it requires recklessness.

9 Generally, as a society, we don't imprison people for
10 negligent behavior. There are other remedies that are sufficient
11 to deter. And so, the question is, is a sentence of probation,
12 or some other sentence that doesn't require him to be imprisoned,
13 appropriate to deter others who are similarly situated?

14 Well, from a company standpoint, Chemstream spent \$20 -- I
15 mean \$12 million -- requiring the ERT and Freedom Companies and
16 Poca Blending, and it was gone within 30 days. That is a
17 powerful deterrent to other companies that you'd better get your
18 act in line.

19 As to the individuals who may be in the position of Mr.
20 Farrell, this case has had a substantial impact on Mr. Farrell.
21 He has faced many civil lawsuits. Two were just filed last
22 month. And so, the settlements he reached, to the extent that he
23 was able to resolve those, going forward, he still has others to
24 face.

25 He agreed to release his claim to the AIG Insurance on the

1 company for defense costs and indemnity to allow that money to be
2 paid into the bankruptcy estate to help settle the claims and pay
3 for the cleanup. He's agreed to release the remaining money and
4 the sales escrow account, which originally was around \$3 million,
5 but was down to \$1.9, the last figure I saw, so it could go to
6 pay claims and for cleanup.

7 He paid \$50,000.00 to settle one of the civil suits, but
8 that was done only after the plaintiff's lawyers did an asset
9 review of Mr. Farrell to determine what the appropriate
10 settlement was.

11 He's had substantial legal fees that probably are greater
12 than any single client I've ever had, Your Honor, and that's
13 because he's faced criminal cases, civil cases, and bankruptcy.
14 And it's not just me. We've had to bring in bankruptcy counsel
15 and other counsel as the needs arose.

16 Mr. Farrell has lost most of everything he gained after
17 working 15 years to build Freedom. Going forward, he lost a
18 three-year employment contract, which he indicated after which,
19 he probably would plan to retire.

20 Just recently, within the last probably four weeks, he has
21 found a job which pays him about one third of what he would have
22 made on an annual basis under those contracts. He lost the
23 earnout that he was to receive going forward under the sales
24 contract, which may have paid him an additional \$1 million. And
25 so, you can see it's had a huge economic impact on Mr. Farrell

1 and his family.

2 His daughter lost her job. She was one of the 30 employees
3 that had good-paying jobs at Freedom. He used to provide
4 significant financial support to his very elderly and ill
5 parents, as set forth in one of the letters, but that has been
6 significantly curtailed. And the workers he considered family
7 all lost their jobs. Some have not yet found new ones. That
8 would only serve as a human impact going forward to others
9 similarly situated.

10 Your Honor, Mr. Farrell is a good man, as shown in these
11 letters. He's a good father and he's a good husband. I was
12 amazed at the quality of the letter that was sent about him by
13 his ex-wife. It was such an amazing thing to see her say such
14 glowing things about his qualities as a person and his qualities
15 as a father.

16 His competitors say they can't get business from him because
17 he was so trustworthy, he always did what he told his customers
18 he would do, and so they never left him, and it reflects that he
19 has a charitable heart, often giving money to others.

20 Your Honor, I believe the sentence that allows him to remain
21 in the community either under Zone A or Zone B is an appropriate
22 result and so, therefore, I would ask for a departure under Note
23 3, and/or in combination with a variance, for the reasons I have
24 stated, and for consistency in sentencing, to result in such a
25 sentence. Thank you, Your Honor.

1 THE COURT: Thank you, Mr. Carey.

2 Mr. Wright?

3 MR. WRIGHT: Your Honor, it's been said many times that
4 this was an environmental crime with very serious and significant
5 consequences, a tremendous disruption to people's lives, harm to
6 the economy, and a level of anxiety that ensued as a result of
7 the discharge of MCHM in the subsequent Do Not Use advisory that
8 makes this just simply an extraordinary case and, up until
9 January, 2014, and I didn't mean to suggest that this was
10 unprecedented in light of what happened in Flint, but Flint
11 happened after this case, and I'm not aware of any interference
12 with a community water supply on this scale before this case
13 happened, and it happened because of a long-standing negligence
14 that goes back to 2002.

15 Six individuals have been prosecuted in this case, so the
16 blame -- and the corporation. The blame does not fall solely on
17 any one person's shoulders. This was a case with individual, but
18 also institutional failure, to comply with the law. There was a
19 cultural failure at this corporation. And the leader of that
20 corporation for many years, the head of the corporation, the
21 president of the corporation, was the defendant. He's a
22 businessman. But in these kinds of cases -- and he doesn't have
23 any criminal history points, but that's not unusual for a case
24 like this. He was associated with Freedom for many years and he
25 was responsible for and he set the culture. He was the one who

1 set that culture.

2 By all accounts, he was a hard-working businessman, very
3 successful for many years, and his focus was to make money.
4 That's what businesses do, and we don't begrudge that. We want
5 businesses to make money or there won't be any businesses, but
6 you have to do it responsibly. You have to do it with a level of
7 care commensurate with the risk of your business, the risk that
8 your business creates, and the more risk involved with your
9 business, then the more due care that you should exercise in
10 proportion to that risk.

11 He didn't sell shoes. He didn't run a book store. He ran
12 an industrial plant filled with chemicals in a tank farm,
13 thousands of gallons of chemicals that are sitting on a riverbank
14 just yards from a river. In light of that, you need to take
15 appropriate measures to make sure that those chemicals never,
16 ever contaminate the environment.

17 Mr. Carey has pointed to his efforts and his desire to have
18 an erosion project taken -- or undertaken in -- that project was
19 undertaken, or supposed to be undertaken in 2009, and he points
20 out that the co-defendant, Mr. Herzing, vetoed it because, under
21 their policy, one veto by the owner would result in the project
22 not going forward. There's no evidence that Mr. Farrell tried to
23 convince Mr. Herzing, "Boy, this is really serious. We need to
24 do this." No evidence he tried to persuade him, encourage him,
25 try to change his mind, or otherwise convince him that he was

1 wrong.

2 In 2010, Your Honor, the tank -- and I would ask that you
3 make the drawing of this chart that Mr. Carey handed to the Court
4 an exhibit.

5 THE COURT: I'll make them all exhibits, if there's no
6 objection.

7 MR. CAREY: No, Your Honor.

8 **DEFENSE EXHIBITS 1, 2 & 3 ADMITTED**

9 MR. WRIGHT: If you look on that, Your Honor, the
10 Stormwater Plot Plan that's dated June 10th, 2009, it shows Tanks
11 393-397 all sitting on that concrete pad. In 2010, they
12 discovered that Tank 393 was leaning, leaning towards the river.
13 They had their own leaning tower of chemicals sitting on their
14 tank form leaning towards the river. They had to fix it.

15 It was nine inches off center in 2010. They didn't fix it
16 until 2011, by which time it was well over ten inches off center,
17 and they fixed it by digging underneath the high side, digging
18 the dirt out from under it, and having it settle back down. That
19 should have been an indication, we've got problems here at this
20 tank form. They didn't do anything after that to -- he did not
21 then go back to Mr. Herzing and said, "Well, now we really need
22 to take look at the erosion project."

23 At the June 20th -- or January 27th hearing, it was
24 suggested that Mr. Farrell always believed that the concrete in
25 that pad extended underneath these tanks. Well, in light of what

1 happened in 2011, when they dug dirt out from under that leaning
2 tank, that just isn't credible. Beyond that, the pictures that
3 we have submitted to the Court, Your Honor, show an extensive
4 amount of cracks, serious looking cracks, in the area around
5 Tanks 395 and 396.

6 If you looked at those cracks, I don't see how you can
7 think, well, gee, everything should be fine because there's
8 concrete under the tank, or so I believe, when there's cracks all
9 over the concrete. That just underscores the amount of the
10 negligence that happened here, Your Honor.

11 Your Honor, I don't take issue with any of the letters that
12 were written on his behalf. Those are very fine letters. But
13 that's not what this case is about. It's not about whether he's
14 a nice guy. It's not about whether Mr. Farrell is generous.
15 It's not about whether Mr. Farrell is kind to strangers. He is
16 all of those things, according to those letters, and I don't have
17 reason to doubt those things, but the case is about did he do
18 what he should have done, and the answer is no; emphatically, no.
19 For many years, no. The level of attention paid by Mr. Farrell
20 and his company and his fellow managers to important
21 environmental concerns was simply appalling.

22 Now, Mr. Farrell pled guilty in this case, as did all the
23 other individual defendants, but he only did so after all the
24 other defendants signed or agreed to sign plea agreements, and
25 now he's asking for basically the same treatment in comparison to

1 Mr. Herzing and Mr. Tis for the sentences they received when he
2 came in last.

3 Mr. Farrell is represented by a former United States
4 Attorney and a former Assistant United States Attorney, who all
5 know the score and the way the system works, that if you want
6 credit and if you want acceptance to get the Government to file
7 something on your behalf for substantial assistance, then you've
8 got to come in, and to sentence these guys at any level
9 commensurate with Mr. Herzing and Mr. Tis would be basically to
10 say those substantial assistance motions are worthless.

11 He should be treated differently because of his leadership
12 position, because he made the choice not to plead guilty when
13 they did, because of the chronic inattention paid by him to
14 important environmental matters, and the long-standing failure to
15 exercise due care, which means a long-standing failure to act as
16 a reasonable person in his position should have.

17 So, yes, he is a nice guy. It doesn't matter that he won't
18 do it again. We know that he will not be in a position to do
19 this again. But, Your Honor, there are other equally and, in
20 fact, more important factors here under the sentencing statute,
21 3553.

22 This is not the usual case. It's not even the most -- it's
23 not even a usual environmental case. An appropriate sentence for
24 almost 12 years of negligence that resulted in the amount of
25 disruption that this case resulted in indicates that the

1 sentencing factors of general deterrence, a sentence that will
2 reflect the serious nature of the offense, and a sentence that
3 will promote respect for the law are paramount factors that
4 should be considered and a guideline sentence will serve those
5 interests and the interests of justice.

6 THE COURT: Thank you, Mr. Wright.

7 MR. CAREY: Your Honor, may I just briefly respond?

8 THE COURT: You may.

9 MR. CAREY: He said that there was no evidence that he
10 tried to persuade Mr. Herzing. This is from their grand jury
11 testimony of Mr. Burdette. He was asked if anyone tried to
12 persuade Herzing to go forward with the project. Mr. Herzing --
13 Mr. Burdette said, "Even though it did not take place in his
14 presence", quote, "I'm sure Denny did because he was the owner
15 putting up the project."

16 Also, the big tanks had gravel around them. They pumped in
17 concrete later to help stabilize it. It was the small tanks that
18 were surrounded by concrete, Your Honor.

19 THE COURT: All right. I'm going to take -- we've been
20 going about two hours. I'm going to take about a 15-minute break
21 and then I will be back to proceed to a disposition.

22 (Recess taken.)

23 THE COURT: All right. After consideration of the
24 advisory guidelines and the other applicable factors under 18 U.
25 S. C. Section 3553(a), I am now ready to impose sentence.

1 Will the defendant please stand?

2 Mr. Farrell, the "Water Crisis" was a traumatic event for
3 the communities in the area where the water service was impacted.
4 It was appalling to realize that a contamination of something so
5 basic, yet essential as drinking water, could happen in this day
6 and age with all of the environmental regulation and awareness
7 that now exists.

8 This event now, two years past, clearly had a disruptive
9 effect on people's lives and, perhaps worse yet, on their trust
10 in the safety of the water coming from their taps.

11 But the crisis passed. We have no reason to believe that
12 problems related to the water crisis linger in our taps. And I
13 have no evidence before me that MCHM, while perhaps an immediate
14 irritant, represents a long-term health threat to anyone.

15 I've struggled, as I've said before, with the sentencing
16 decision in these cases as much as any case I've ever had, all
17 the more so in your case. There are many facets of this case
18 pulling the sentencing decision in different directions.

19 While there's no doubt that causing a discharge of a
20 pollutant chemical into the water supply is a very serious
21 offense requiring a just punishment, I cannot ignore the fact
22 that these charges are misdemeanors and not based on intentional
23 conduct but, at most, negligence -- carelessness in layman's
24 terms -- in Count Three, and even less in Count Two, which
25 charges strict liability and, therefore, no level of intent under

1 the Refuse Act. Further, I note in Count Three, negligent
2 violation of a permit, is obviously related to the circumstances
3 leading to the spill of MCHM, but requires no proof of a spill to
4 establish that crime.

5 Negligence is an unusual foundation for a federal criminal
6 statute. Generally, the legal system relies on lawyers bringing
7 civil litigation to remedy and deter negligence.

8 Further, we handle few misdemeanors in federal District
9 Court. Of the hundreds of criminal cases over which I have
10 presided in nearly ten years, I would estimate that less than ten
11 of those have been misdemeanors before now. Of those, I can only
12 recall one -- a political or Government corruption case -- in
13 which I gave prison time. In the eyes of the legal system, a
14 misdemeanor charge limits the seriousness of the crime and must
15 necessarily limit the punishment, as well.

16 The federal sentencing guidelines recognize this distinction
17 specifically in relation to these very crimes. The guideline
18 calculation which governs these cases is based by the explicit
19 terms of the guidelines themselves on knowing and, therefore,
20 intentional misconduct. If the evidence against you and the
21 other defendants had reflected intentional misconduct, you would
22 all likely be facing the relatively lengthy prison terms the
23 guidelines otherwise call for. However, since they are
24 misdemeanors and not based on knowing conduct, the guidelines
25 suggest a downward departure -- for a negligence case, all the

1 more so for a strict liability crime. The problem for me is they
2 do not recommend how much of a departure should be considered.
3 Thus, the guidelines are frankly of little use in fashioning a
4 sentence in this case.

5 It is likewise difficult to find information on prior
6 sentencings in Clean Water Act and Refuse Act misdemeanor cases
7 to use as a starting point for a sentencing decision. However, I
8 was shown information in the Burdette case that last year,
9 nationwide, 67% of all environmental and wildlife cases got
10 probation only. That percentage was similar -- I checked -- for
11 the previous two years, as well. That number includes all such
12 crimes, presumably both felonies and misdemeanors. In those
13 circumstances, one would expect that the proportion of
14 misdemeanors receiving probation would be even greater. I
15 received information and provided to both sides today from the
16 Sentencing Commission that indicated that more than 90% of these
17 misdemeanors get either a fine only or probation only.

18 Perhaps even more instructive is information you've
19 confirmed in the prosecutions arising out of the oil spill in
20 the Gulf of Mexico from the BP deepwater Horizon. That was
21 obviously a calamity that vastly eclipses this case in terms of
22 both environmental and economic impact. Five individuals have
23 been prosecuted in that case. One was acquitted of
24 obstruction-related felony charges, and two others pled guilty to
25 similar felony charges, and neither of them received prison

1 sentences. Two others were charged with manslaughter charges
2 relating to the eleven deaths that occurred on the platform, as
3 well as negligent Clean Water Act violations, similar to those in
4 this case. The manslaughter charges were dismissed. One
5 defendant is pending trial on the remaining negligent Clean Water
6 Act charge. The other pled to a negligent Clean Water Act charge
7 and is pending sentencing, but the Government and defendant
8 agreed to a binding sentencing recommendation of ten months of
9 probation.

10 As most of you are aware, I had a hearing to sort through
11 some issues regarding the factual basis for this and other cases
12 about two weeks ago. As I explained then, I take the requirement
13 that I find a factual basis for every legal element, the
14 components of the charge, very seriously. I closely studied and
15 wrestled with the factual basis in these cases because the
16 charges are complicated. Frankly, I have little experience in
17 environmental issues and these cases have required some
18 stretching and tugging on both the facts and the law to find a
19 factual basis in this case.

20 For example, to find a factual basis on the Refuse Act, I
21 had to find that the responsible corporate officer doctrine
22 applies, even though no court in the country has ever so held in
23 a criminal case.

24 Another example is that there is no guarantee that putting
25 these plans in place at Etowah would have prevented this leak.

1 There's no way to know for sure because it never happened. This
2 is weight on me as I have considered this sentencing decision.

3 By the way, this is not a criticism of the work of the
4 prosecutors. Even the best lawyers must play the factual hand
5 that they are dealt. The lawyers on both sides have obviously
6 worked hard and sweated the details to bring about an appropriate
7 resolution of these charges, even as they have effectively
8 advocated for their respective clients.

9 This defendant is hardly a criminal. He has negligible
10 criminal history and has been a businessman most of his life.
11 His crimes are those of careless omission. He poses little
12 threat to the public and I find little need to deter him from
13 further crime with this sentence.

14 Most sentencing factors under Section 3553(a), particularly
15 those related specifically to this defendant and these particular
16 crimes, tend to suggest that no prison time is necessary in this
17 case. However, deterrence of others and, by extension, promoting
18 respect for environmental laws, is also an extremely important
19 consideration. First, I note that the prosecution itself will
20 likely have a significant deterrent effect, not to mention the
21 resulting damage to reputation, large bills from lawyers, and the
22 anxiety of facing justice before a judge, aside from an onslaught
23 of civil litigation.

24 Potential polluters should take note of what happens even
25 when you first turn a blind eye to environmental issues, not to

1 mention polluting intentionally. Thus, the efforts of the
2 Government and the investigative agencies in these cases have
3 already created a deterrent to this sort of conduct. Of question
4 for me today is what sentence is sufficient, but not greater than
5 necessary to complete the deterrent message of this prosecution?

6 It is apparent to me now that the problem with Freedom
7 Industries was probably a mixture of misplaced priorities and
8 incompetence. You hired an environmental guy who had no clue how
9 to make sure a facility like Etowah was properly run from an
10 environmental standpoint and relied on him way too much. That
11 was a recipe for disaster.

12 On the other hand, apparently in part because of a surprise
13 EPA inspection around 2011, you got it relatively right at Poca
14 Blending. That inspection resulted in the implementation of a
15 Spill Prevention Control and Countermeasures Plan. Further, at
16 least by 2013, you had both a Stormwater Pollution Prevention
17 Plan and a Groundwater Protection Plan in place at Poca Blending.
18 Yet, you had none of these at Etowah, even though all were
19 required, it turns out. These are not helpful facts for you.

20 Ultimately, you were the President. It was all your
21 responsibility, along with the other owners, and you failed.
22 What I must decide is what I need to do to get the attention of
23 any other Dennis Farrells out there who may need some incentive
24 to straighten up and get it right.

25 Is probation and a large fine sufficient to deter others

1 from this kind of careless treatment of the environment? Or is
2 the reality of time in custody, even with all the other
3 consequences that these cases require -- even with all the other
4 consequences of these cases required to have the appropriate
5 deterrent effect? These questions candidly have vexed me for
6 weeks.

7 As I wrote those words last night, I had not decided if
8 prison would be a part of this sentence or not. By morning, I
9 had realized that the answer was contained in what I had already
10 written. You had these plans in place at Poca Blending, but not
11 Etowah. An inspection by the EPA in 2011 at Poca Blending did
12 not bring attention to these things sufficiently to correct the
13 lack of plans at Etowah. One would hope that an interaction with
14 the EPA that ended up costing quite a bit of money, even though
15 it related to a different site and a different type of plan,
16 would cause you to think, "I had better make sure my business is
17 fully compliant with all the environmental regulations." But
18 that's not what has happened.

19 I know it was not intentional. It was a mistake, a
20 negligent mistake with big consequences; but, obviously, more is
21 required to focus others similarly situated, the other Dennis
22 Farrells of the world, on the necessary actions to be taken.
23 I, therefore, conclude that probation is an ineffective incentive
24 and deterrent. Some time in custody is needed to deter this
25 conduct and promote respect for environmental laws.

1 It is, therefore, based on these factors the judgment of
2 this Court that you be committed to the custody of the Federal
3 Bureau of Prisons for one month, 30 days. This is a departure
4 under Section 2Q1.3, Application Note 3.

5 Upon release from prison, you shall be placed on supervised
6 release for a term of six months.

7 Within 72 hours of release from custody, you shall report in
8 person to the U. S. Probation Office in the district to which you
9 are released.

10 While on supervised release, you must not commit another
11 federal, state or local crime and you must not unlawfully possess
12 a controlled substance.

13 You also must comply with the standard terms and conditions
14 of supervised release as recommended by the U. S. Sentencing
15 Commission and as adopted by this Court, except that you need not
16 participate in a program of testing, counseling and treatment for
17 drug and alcohol abuse, as that does not appear to be implicated
18 in your case.

19 You must also abide by the special conditions of supervised
20 release as set forth in the local rules of this Court.

21 I will also not include a drug testing requirement.

22 I am going to impose and hereby fine you in the amount of
23 \$20,000.00. That will -- if that is not paid within 15 days of
24 today, it must be -- interest will begin to accrue on the fine
25 amount. It will be a special condition of your supervised

1 release that you pay the fine, if you haven't already. The main
2 reason I'm imposing supervised release is to make sure that the
3 fine is paid.

4 Along those lines then, I will also add two additional
5 conditions to your supervised release, and that is, first, that
6 you shall be required to provide the probation officer -- provide
7 the probation officer access to any requested financial
8 information; and, second, you shall pay all monies received from
9 income tax refunds, lottery winnings, judgments, and any other
10 anticipated or unanticipated financial gains to the fine
11 obligation.

12 I note that the special assessment has already been paid.

13 You may be seated.

14 Mr. Wright, I believe, with regard to this defendant, one
15 count remains pending, and that is Count One; is that correct?

16 MR. WRIGHT: That's correct, Your Honor.

17 THE COURT: And is there a motion with regard to that
18 count?

19 MR. WRIGHT: Your Honor, the United States moves to
20 dismiss Count One as to Dennis Farrell.

21 THE COURT: That motion will be granted.

22 Mr. Carey, I am going to include in my J&C not just a
23 recommendation, but an order that the defendant shall not be
24 housed in a -- or designated to a state facility. I learned in
25 looking into this this afternoon that, sometimes, with short

1 sentences like this, it's possible that the Bureau of Prisons
2 could designate him on a contract basis to a state facility and
3 they -- the Bureau of Prisons designation senator assures me if I
4 order that they not do that, that he will be designated to a
5 Bureau of Prisons facility and not state facility.

6 Having said that, are there any recommendations then that
7 you or your client would like for me to make to the Bureau of
8 Prisons?

9 MR. CAREY: Yes, Your Honor, that he be sent to a
10 camp-type facility because of the nature of the crime and the
11 shortness in duration of the sentence. He doesn't pose a danger
12 to society, so he doesn't need to be held in anything above a
13 camp level, and ask that it be within a relative distance of his
14 home. There's several camps within the area now, and I would ask
15 that it be within reasonable proximity, and that he be allowed to
16 self-report at the time and place that the Bureau of Prisons
17 designates.

18 THE COURT: I will -- I think the closest camp is
19 actually at Beckley.

20 MR. CAREY: Yes. I'm not sure anymore. I think there
21 is one there.

22 THE COURT: Mr. Lambert? Or maybe I should ask the
23 marshals.

24 USDM INGRAM: Your Honor, to my understanding, Beckley,
25 Ashland, Morgantown, they would all have camps.

1 THE COURT: All right. Well, I will recommend that the
2 defendant be designated to a camp facility as close to his home
3 in Charleston as possible. With regard to self-reporting, does
4 the Government have any objection to that?

5 MR. WRIGHT: No, Your Honor.

6 THE COURT: All right. I will allow the defendant to
7 self-report to serve his sentence as directed by the United
8 States Marshal Service.

9 Mr. Farrell, you have the -- there's a significant appeal
10 waiver contained in your plea agreement. As qualified by that
11 waiver, you have the right to appeal the judgment of this Court.
12 Any Notice of Appeal must be filed with the Clerk not more than
13 14 days from the date of the entry of the judgment order.

14 If you desire counsel on appeal and you are unable to retain
15 counsel, the appropriate Court will review a financial affidavit
16 filed by you to determine whether or not to appoint counsel.

17 Do you understand your right to appeal and the 14-day filing
18 requirement?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: I will place the Presentence Report under
21 seal subject to counsel's right to unseal as necessary for
22 appeal.

23 Any other matters we need to take up in this case?

24 MR. WRIGHT: No, Your Honor.

25 MR. CAREY: No, Your Honor.

1 THE COURT: All right. Thank you.

2 (Proceedings concluded.)

3
4 CERTIFICATION:

5 I, Ayme A. Cochran, Official Court Reporter, certify that
6 the foregoing is a correct transcript from the record of
7 proceedings in the matter of United States of America, Plaintiff
8 v. Dennis P. Farrell, Defendant, Criminal Action No.
9 2:14-CR-00264-1, as reported on February 11, 2016.

10
11 s/Ayme A. Cochran, RMR, CRR

February 15, 2016

12 Ayme A. Cochran, RMR, CRR

DATE